HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

THE members of the Selden Society and others will be glad to know that vol. 3, by Mr. Baildon, is nearly ready for delivery, and that vol. 4, by Professor Maitland, is already in the press. The former is a collection of *placita* in the King's Courts, the latter of *placita* in the Manor Courts. Each contains an invaluable Introduction; the proof-sheets of Professor Maitland's Introduction being already at hand.

THE recent decision in *Whitby* v. *Mitchell*,[1] on the much-disputed question as to the existence of a rule at common law forbidding the limitation of estates for life to successive generations, seems not to have been received in England with favor. The case in brief was this: by a marriage settlement lands were conveyed to the use of the husband and wife successively for life, with remainder to the use of any of their children or more remote issue (born before appointment made) as the husband and wife should by deed appoint. By a deed (which of course had to be read as a part of the marriage settlement) they appointed to the use of a married daughter for life, with remainder to the use of her children living at the date of the deed of appointment. This last clause brought the remainder within the period allowed by the rule against perpetuities, since it necessarily became vested within a life in being at the time of the settlement; but the Court of Appeal decided that there was, resting on an old common-law prohibition against a possibility upon a possibility, a rule still in existence that if an estate were given to an unborn person for life followed by a remainder to any child of such unborn person, the remainder was void.

It is to be noticed that the court did not decide that the rule against perpetuities did not apply to contingent remainders.[2] They affirmed the existence of this other rule as entirely independent of the rule against

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[1] 42 Ch. D. 494, affirmed in Court of Appeal, 44 Ch. D. 85.

[2] For a full discussion of this disputed question, on which the existence of the rule laid down in *Whitby* v. *Mitchell* has an important bearing, see Gray, Perp., §§ 284-298. Mr. Justice Kay has held, since his decision in *Whitby* v. *Mitchell*, that the rule against perpetuities does apply to contingent remainders. *In re Frost*, 43 Ch. D. 246.

perpetuities; and they based their decision principally upon the opinion of the late Mr. Joshua Williams. "The idea that there cannot be a possibility on a possibility seems to have been a conceit invented by Chief Justice Popham,"[1] and Mr. Williams himself admits that it is bad law, but nevertheless lays down absolutely the rule affirmed in *Whitby* v. *Mitchell*, saying that it is "apparently derived from the old doctrine which prohibited double possibilities."[2] That the rule in question was not derived from this exploded doctrine, but was, on the contrary, a mere corollary to the rule against perpetuities, seemed to have been abundantly proved by the careful examination of authorities made by Mr. Lewis[3] and Mr. Gray[4] in their books on perpetuities; and the decision of *Whitby* v. *Mitchell* has since been impugned by an able article by Mr. Vaizey in the October number of the "Law Quarterly Review"[5] and also by the "Solicitors' Journal."[6]

In view of the exhaustive researches made by the writers above referred to, it would be useless for us to attempt any discussion of the subject; and we content ourselves with the expression of a humble opinion that the Court of Appeal has made an erroneous decision. From a practical point of view, the decision is at least unfortunate; for it puts a greater restriction upon future interests which happen to be in the form of contingent remainders than upon others, although on principle there seems to be no reason for making such a distinction. In regard to the question of remoteness, all future contingent interests are in reason upon the same plane, and it is to be regretted that a useless distinction should be made, based upon an evident misinterpretation of the old cases.

ONE of the most perplexing questions which has arisen in connection with the "original package" decisions is, what constitutes an original package? Whether, for example, where a box containing a dozen bottles of liquor is brought into a State, the box is the original package, or whether each bottle may be so treated. In the recent case of *Allen* v. *Black*,[7] in the Circuit Court for the Southern District of Iowa, where a box containing bottles of whiskey was shipped from Illinois to Iowa, and sold by the bottle in Iowa, the court considered the question whether the bottle or the box was the original package as a doubtful one. In the Circuit Court in Mississippi, however, in the case of *In re Harmon*,[8] it was flatly decided that the box, and not the bottle, constituted the original package within the meaning of the decisions of the Supreme Court.

The court says in this latter case: "These bottles were closely packed together in the boxes by the shipper, and in that form shipped to Sardis, and in that way they were kept by relator until sold and taken out, one bottle at a time. It was, in other words, a retail saloon. I am satisfied that the whiskey in the box, although in separate bottles for the convenience of the trade in this retail saloon, was but one package within the meaning of the interstate clause of the Constitution, as construed by the Supreme Court." Further on the judge continues: "In reaching the above conclusion, I do not decide

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[1] Gray, Perp., § 125.
[2] Williams, Real Prop. (6th ed.) 245.
[3] Lewis, Perp., c. 16 & Suppl. 97-153.
[4] Gray, Perp., §§ 125-133, 191-199, 287-298.
[5] 24 L. Quar. Rev. 410.
[6] 35 Sol. Jour. 83 (Dec. 6th, 1890).
[7] 43 Fed. Rep. 228 (1890).
[8] 43 Fed. Rep. 372 (1890.)

that a single bottle of whiskey may not be shipped and sold by itself as a single and unbroken package, but it must be shipped alone and sold as shipped."

This would seem to be a pretty strong decision, especially as it appeared in the case that the boxes in which the bottles of whiskey were transported were uncovered and furnished by the express company, while each bottle was sealed up in a separate paper package. One may infer from the opinion of the judge that a single bottle, properly sealed, would be considered an original package; and on what principle he draws a distinction between one "single bottle" and half a dozen, which happen to be shipped at the same time and put for the sake of convenience into one box, and that an open, uncovered one, it is difficult to comprehend, and the opinion must be considered as greatly weakened in consequence. Logically, the learned judge would be obliged to hold that if a car-load of bottles of whiskey, each bottle separately packed in a wrapper and sealed, were sent from one State to another, the original package would be the freight-car, and the original package would be broken as soon as the first whiskey bottle was removed. It is difficult to see the force of such reasoning as this. Logically, each bottle would seem to be an original package, and if sold as shipped, it is difficult to discover on what principle the vendor could be indicted.

May a Member of Congress Circulate his Speeches generally, if Defamatory?

In his Commentaries on the Constitution of the United States, Mr. Justice Story says: "Although a speech delivered in the House of Commons is privileged, and the member cannot be questioned respecting it elsewhere, yet if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel. And the same principles seem applicable to the privilege of debate and speech in Congress." § 866.

To this the following note will appear in the 5th ed. of the same work (now in the press), by the editor, Mr. Bigelow: —

The first sentence quoted would now be too broad a statement. A member of Parliament may certainly circulate among his *constituents* a speech made by him in Parliament. *Wason* v. *Walter*, L. R. 4 Q. B. 73, 95; *Davison* v. *Duncan*, 7 El. & B. 223, 229. (For the law of England before legislation see *Stockdale* v. *Hansard*, 9 Ad. & E. 1; *Wason* v. *Walter*, *supra*.) And it may be doubted whether any such qualification of the privilege as that suggested (of constituency) can be worked in this country. Practically, the qualification is everywhere ignored, if it exists. Members of Congress, if not of the State Legislatures, act upon the supposition that the circulation, by themselves, of their speeches is (*prima facie*) privileged, and that the privilege is not limited in territory. And if such circulation is privileged, it cannot be limited in that way without absurd consequences. A member of the House of Representatives delivers a speech there, containing defamatory reflections upon some one; on the next day he is transferred to the Senate, and the same speech, with the same reflections, is delivered there; must the speaker be confined to the particular district which he represented in the House, in circulating the first speech, while he has the whole State for the

second? Again, the subject of the reflections themselves may concern the whole country, as in the case of an impeachment; in such a case shall one who represents a very poor and degenerate constituency, *e.g.* the lower part of the city of New York, have the right to circulate his speech there, where it will probably have no effect for any purpose, and be cut off from circulating it among more enlightened people? Again, if a "fair report" of the proceedings of the body may be published (without malice), by newspapers circulating generally, how can it be that a member of that body must not circulate his own speech, — assuming that it contains or is accompanied with a fair report of the proceedings, — beyond his constituency? Once more, a member's constituency is migratory part of the year, as from June till October; must the member withhold his speeches during that time for fear that, if he sends them for distribution, addressed generally to the postmaster of a common resort of his constituents, copies may be delivered to persons not of his district or State?

It is plain then that any concession that a member of the Legislature may send his speeches to his constituents is a yielding, in this country, of the whole argument (see Story, *ut supra*) against privilege in such cases. And, further, the existence of a privilege itself, for the circulation of a speech by the person who made it, is in ordinary cases warranted and required by the general rule already referred to, by which fair reports of the proceedings may be privileged. "In ordinary cases," we say, for generally the printed speech contains a sufficient report of the occasion. The real difficulty, so far as there is any difficulty, is with the circulation of speeches which would not be privileged on the footing of a publication, *e.g.*, in the newspapers, of a fair report of the proceedings. And in regard to that case, it is hard to see any reason which can justify circulation among a member's constituency without justifying circulation generally. It is hard to justify either. The true rule, it is apprehended, should be to put the circulation of speeches altogether upon the footing of fair reports, justifying the speaker only as he would be justified as the publisher of a newspaper reporting to the world the proceedings of the Legislature.

It is now too late, however it may have been sixty years ago (Story wrote in 1832), to question a privilege of fair reports; and as for the doctrine of privilege itself, that of course is fundamental. Society could not long exist if to do harm, whether in self-protection or in the discharge of duty, were not permitted. It is only necessary that the justification should be limited to the reasonable requirements of the particular case. I may do harm to my neighbor only in so far as may reasonably appear necessary in the discharge of duty or in protecting myself, my family, or my property.

The privilege in question is of course of the kind called *prima facie;* that is, it exists on the footing that the act of the sender was not malicious, — not done, *e.g.*, with an indirect motive of wrong. (As to malice in that sense see *Stevens* v. *Midland R'y Co.*, 10 Ex. 356; *Abrath* v. *Northeastern R'y Co.*, 11 Q. B. Div. 440, 450, Bowen, L. J.; s. c. 11 App. Cas. 247.) But the mere sending a speech beyond one's constituency, far from establishing, could not even, in reason, be evidence of malice.

Melville M. Bigelow.

THE newspapers seem to have fallen into error as to the ground of the decision of the United States Supreme Court in the Kemmler case, 136 U. S. 436. The court is criticised for holding that execution by electricity is not a cruel and unusual punishment, prohibited by the eighth amendment to the Constitution of the United States, — that cruel and unusual punishments shall not be inflicted. But the counsel made no claim upon this ground, and in fact no lawyer would assert that the eighth amendment gave the United States courts any right to interfere in this case. The court expressly said: "It is not contended, as it could not be, that the eighth amendment was intended to apply to the States." Chief Justice Marshall had decided, in *Barron* v. *Baltimore*, 7 Pet. 243, that this provision was a limitation solely upon the Federal government. The ground which Kemmler's counsel took was that the law under which the prisoner was sentenced violated the fourteenth amendment, — first, because it abridged the rights and immunities of a citizen of the United States; and, second, because it was not due process of law. The Slaughter-House cases, 16 Wall. 36, annihilated the first point, and the second was untenable. The court seemed to intimate, however, at the close of the opinion, that a punishment might be so cruel as not to be "due process of law." Even this is very doubtful. A State could probably revive burning at the stake, as far as United States authority is concerned. Although the court of New York held that execution by electricity was not repugnant to its own constitution, that opinion might well be changed in the light of subsequent experiment.

Apropos of this subject, the phrase "cruel and unusual punishment" probably refers to quality and not quantity, or, as the Supreme Court of Kansas said, to "kind and not duration."[1] The facts of that case bring out the distinction in a forcible and interesting manner. By an act of the Legislature in 1887 the age of consent was raised to eighteen, and unlawful intercourse with any female under that age was made punishable by not less than five nor more than twenty-one years. In such a case, therefore, five years is the least possible punishment for fornication. Such a severe punishment, it was argued, was cruel and unusual; but the case was decided contrary on the distinction between amount and kind. The court remarked that the punishment was "a severer one than had ever before been provided for in any other State or country for such an offence."

IN view of the conflict of authorities in the United States as to whether a common carrier shall be allowed to limit his liability for the loss of goods, even where the loss occurs through his own negligence, it is interesting to note a recent decision in the Supreme Court of Pennsylvania, in the case of *Pennsylvania R.R. Co.* v. *Weiller*.[2] The court distinctly lays down the rule that although there is an agreed valuation of the goods between the shipper and the carrier, and although it is expressly stipulated that the carrier shall not be liable beyond such valuation for loss occurring *from any cause whatever*, and in consideration of such agreement a lower rate of freight is charged, yet the carrier is not thereby relieved from liability for the actual value of the goods lost.

[1] *State* v. *White*, 25 Pac. Rep. 33.
[2] 29 Am. Law Reg. 766 (1890).

It is pretty firmly established that a common carrier cannot, by a simple stipulation in the bill of lading, contract away his common-law liability for loss arising from his own negligence, in the absence of an express valuation agreed upon between the shipper and the carrier. But the question on which the courts of this country are at variance is whether the presence of an agreed valuation will relieve the carrier from responsibility.

The doctrine of *Pennsylvania Co.* v. *Weiller* obtains in twelve States and the District of Columbia; the contrary doctrine, in the Supreme Court of the United States, and in nineteen of the States. So that though the larger number of jurisdictions are in favor of allowing the carrier to contract away his liability for negligence, yet the law cannot by any means be regarded as settled.

The leading case in opposition to the Pennsylvania doctrine is *Hart* v. *Pennsylvania R.R. Co.*,[1] in the Supreme Court of the United States. The court agreed that a common carrier could not stipulate for exemption from liability for his own negligence, but laid it down that where the shipper has agreed upon a certain valuation of his goods, and has also agreed that the carrier shall not be liable beyond this sum, it was "just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier."[2] The grounds of the decision are that to disregard the agreement after loss "is to expose the carrier to a greater risk than it was intended he should assume. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater." The theory that the shipper is estopped to deny that the actual value of the goods is the value he himself has put upon them, is perhaps the prevailing basis of decisions in jurisdictions where the case of *Hart* v. *Pennsylvania R.R. Co.* has been followed.

The grounds for the opposite conclusion are that such a stipulation is contrary to public policy, and that the old common-law rule of absolute liability, except for loss occurring through the act of God or the public enemies, had been sufficiently broken in upon by allowing the carrier to exempt himself from liability by special contract for loss not occurring through his own negligence. And that even though the shipper does consent to a certain valuation, he cannot thereby relieve the carrier from liability for negligence, because in so doing he is trying to regulate not his own but a public right. The public welfare demands that the common carrier shall be responsible for his own negligence and that of his servants, and consequently any agreement which attempts to interfere with this public right must be void, as contrary to public policy.

A SIMILAR decision to that reached in *Pennsylvania Co.* v. *Weiller* has been handed down very recently in the analogous case of a telegraph company, the *W. U. Tel. Co.* v. *Short*,[3] in the Supreme Court of Arkansas. It was held that an agreement entered into between the sender of a telegram and the telegraph company, exempting the company from liability beyond the price of the message for mistakes or delays in the transmission or delivery, unless the message is repeated, whether happening through the negligence of the company or otherwise,

[1] 112 U. S. 331 (1884). [2] Per Blatchford, J.
[3] 14 S. W. Rep. 649 (1890).

was void as against public policy. The court says: "It is true that many authorities have held that such an agreement is binding upon all who assent to it," because of the "'risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delays;'" but this is "not a sufficient reason why such stipulations should be sustained. The telegraph company is only bound to use ordinary care and diligence in transmitting messages, and is not responsible for any errors or failures which such care and diligence are insufficient to guard against or avoid."

THE Bishop of Lincoln's case, which has attracted so much attention in England on account of its importance in regard to the rites of the church, presents also several matters of interest from a legal point of view. The jurisdiction of the Archbishop of Canterbury's court (a question to which attention was called in 3 Harv. Law Rev. 42) was affirmed by the judgment delivered in May, 1889, but it was not until Nov. 21, 1890, that the archbishop delivered judgment upon the merits. The judgment, which is exceedingly long, shows great learning and very careful research in regard to the ecclesiastical questions at issue. The point which chiefly concerns us, however, is the fact that, although the archbishop's court is admitted to be one of first instance from which an appeal lies to the Privy Council, the archbishop disregards three decisions of the Privy Council and reaches exactly opposite conclusions.[1] His justification lies in the fact that his historical investigations, which appear to have been most thorough, have thrown new light upon the questions in dispute; and it must be conceded that upon such subjects his opinion, based upon the profound learning of himself and the five bishops sitting with him, is of much greater weight than that of the judicial committee of the Privy Council.

To a lawyer, the spectacle of a court of first instance undertaking to review the decisions of the court of last resort is indeed somewhat startling. Yet from a layman's point of view (at any rate on this side of the water) it cannot be denied that the result reached seems eminently satisfactory. For what more fitting than that a purely ecclesiastical question should be decided by the highest ecclesiastic in the land, unfettered by the opinions of common-law judges.

From a practical standpoint, moreover, there is an obvious difference between this case and that of an inferior common-law court. For while it would be sheer waste of time, if nothing worse, for the latter to disregard a decision of the House of Lords (especially in the light of the English doctrine that the House of Lords is absolutely bound by its own decisions), it seems to be generally supposed that in the case before us the defeated party will be satisfied to abide by the archbishop's judgment.

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[1] *Martin* v. *Mackonochie*, 2 P. C. 365 (1868); *Hebbert* v. *Purchas*, 3 P. C. 605 (1871); *Ridsdale* v. *Clifton*, 2 P. D. 276 (1877).